83-772

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No.....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SNOWSHOE COMPANY,
a West Virginia corporation,

Petitioner,

vs.

JOHN J. KRUSE and
LEONARD K. JACKSON,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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JARRETT PRINTING COMPANY, CHARLESTON, W. VA.

QUESTION PRESENTED

Did the Federal District Court for the Southern District of West Virginia abuse its discretion by exercising jurisdiction and issuing a preliminary injunction affecting the use of an easement when the use of the easement was the subject of a prior and ongoing state court action?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Snowshoe Company, a corporation, respectfully prays that a writ of certiorari be issued to review the decision and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding August 10, 1983.

*Petitioner was defendant in the District Court and Appellant in the Court of Appeals.

OPINIONS BELOW

The Opinion of the Fourth Circuit is printed in the Appendix at A., pp. 1a-8a. The order of the United States District Court for the Southern District of West Virginia granting the plaintiff's motion for preliminary injunction and the Court's findings of fact and conclusions of law are not reported, but are printed in the Apepndix as App. B. and App. C., pp. 9a-20a.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on August 10, 1983. This petition is timely filed within 90 days of that date. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254.

STATUTES INVOLVED

(1) 28 U.S.C. §1331

Federal Question

The district court shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

(2) 28 U.S.C. §1332(a)

Diversity of Citizenship; amount in controversy; costs

(a) The district court shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000 exclusive of interest and costs, and is between

(1) citizens of a different States;

(2) citizens of a State and citizens or subject of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties;

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

STATEMENT OF THE CASE

I. Jurisdiction

The respondents, John J. Kruse and Leonard K. Jackson (hereinafter "Kruse and Jackson"), filed this action in the United States District Court for the Southern District of West Virginia against Snowshoe Company seeking the determination of Kruse and Jackson's rights in an easement across Snowshoe's estate and alleging certain West Virginia and federal antitrust violations. Thus, jurisdiction in the lower court was predicated upon 28 U.S.C. §§1331, 1332, and 1337.

II. Statement of the Facts

This conflict arises from a disputed right of first refusal contained in an Option Agreement and contested easement rights contained in a Deed between Snowshoe Company and its predecessor in interest, the Mower Lumber Company, also the predecessor in interest to Kruse and Jackson. Snowshoe Company (hereinafter "Snowshoe") purchased its property from Mower Lumber Company (hereinafter "Mower") on September 6, 1973, by means of a deed which reserved to Mower and its assigns the right to use a road on the property, the Black Run Road, for the purposes of ingress and egress to and from other adjoining lands then owned by Mower.

Contemporaneously with that Deed, the parties executed a Right-of-Way and Road Maintenance Agreement governing the use and maintenance of Black Run Road. On the same day, Snowshoe and Mower executed an Option Agreement by which Snowshoe was granted an option to purchase certain adjoining lands and a first right of refusal for ten years on a particular tract adjoining the Snowshoe estate.

Subsequent to 1973, Snowshoe developed its estate into a ski resort and ultimately, into a year-round resort facility. In August of 1978, Snowshoe notified Mower that it intended to exercise its option. An agreement for sale was drawn, stating that the 1973 Option Agreement was to be superseded and cancelled by the sale. However, by letter agreement dated April 26, 1979, the parties agreed that the contract for sale would be null and void unless the purchase transaction occurred on May 10, 1979. The sale did not take place and the agreement for sale was nullified.

On October 15, 1982, Mower notified the chief executive officer of Snowshoe that the subject tract was going to be sold on October 22, 1982 for $1,150,000. Snowshoe was informed on October 15th that if it intended to exercise its first right of refusal, it would have to do so before noon on October 22, 1982. Snowshoe informed the representative of Mower that it desired to purchase the property, but could not raise the purchase price in seven days. Nonetheless, Mower sold the adjacent tract to John F. Brown, Jr., John E. Busch and Stephen G. Jory, Trustees for the Mace Knob Land Company. Kruse and Jackson were granted a license by the Trustees to develop the property into a ski resort to be known as Silver Creek. The Black Run Road was to be used as public access to the proposed resort.

Believing that it had not been given an opportunity to exercise its right of first refusal because of evidence that different payment terms were offered to Snowshoe and the Trustees, Snowshoe filed suit in the Circuit Court of Pocahontas County, on December 1, 1982. Snowshoe sought a determination as to whether the 1978 transactions had cancelled its right of first refusal. If not, Snowshoe asserted that it was not given a reasonable opportunity to exercise that right. If the right had been eliminated, Snowshoe sought a determination as to the extent of the rights of Mower's assignees to use the Black Run Road.

On December 3, 1982, Kruse and Jackson filed suit in federal district court seeking determination of the same issues presented by Snowshoe to the state court and further alleging certain federal and state antitrust violations. Meanwhile, the state court action proceeded. On December 20, 1982 a hearing was conducted in the state court on various motions by summary judgment. On February 1, 1983, the state court indicated to counsel that it was of the opinion that the right of first refusal had expired, narrowing the issues in the state court to a determination of the easement rights created in the 1973 Deed.

Simultaneously with the filing of their federal action, Kruse and Jackson sought injunctive relief, restraining Snowshoe from interfering with their proposed use of the road. The district court granted the motion for a temporary restraining order against Snowshoe on December 3, 1982 and extended its order to remain in effect until December 23, 1982 when the district court conducted a hearing on the plaintiffs' motion for a preliminary injunction. On December 14, 1982, Snowshoe filed a motion to dismiss pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, asserting that Kruse and Jackson

lack standing to bring or maintain this action, that they have failed to join as indispensable parties the owners of the tract and that the district court is bound by the doctrines of abstention and priority to dismiss or abstain from hearing the case because of the parallel state court action. This motion was also heard on December 23, 1982. (It is important to note at this juncture that the factual basis asserted by Kruse and Jackson for the federal and state antitrust claims was that Snowshoe filed a frivilous state court action in order to prevent the neighboring ski resort from being constructed. Thus, a determination of the issues before the state court was necessary prior to reaching any conclusions with regard to the antitrust issues.) The district court's actions with respect to the motions before it are discussed below.

The state court action progressed. On April 18, 19 and 20, 1983, a trial before the Court was conducted on the easement issue. On May 30, 1983, the Court entered its order, portions of which were adverse to Snowshoe. Snowshoe filed a motion for amendments to the findings of fact and conclusions of law or, in the alternative, for a new trial. A hearing was conducted on Snowshoe's post-trial motions on July 5, 1983. On August 10, 1983, the Court amended its findings of fact and conclusions of law and again the result was adverse to Snowshoe. West Virginia Code §58-5-4 provides for an eight month appeal period which has commenced to run. Under West Virginia law, until the appeal period lapses or until the West Virginia Supreme Court of Appeals renders its opinion, the lower court decision does not have the effect of res judicata.

III. The District Court Action

On March 4, 1983, the district court entered a prelimi-

nary injunction order against Snowshoe restraining and enjoining Snowshoe from engaging in any course of action which would prevent the plaintiffs from using Black Run Road as an entrance to the proposed resort property.

On March 7, 1983, the district court entered its findings of fact and conclusions of law with respect to the preliminary injunction order entered on March 4th. The Court addressed many of the issues pending before the State Court. Both the district court's order and findings of fact and conclusions of law are reprinted in Appendix B and Appendix C, at pp. 9a-20a.

To date, no decision has been rendered on Snowshoe's motion to dismiss.

IV. The Appellate Court Decision

On August 10, 1983, the Court of Appeals for the Fourth Circuit affirmed the decision of the district court, holding that the district court had not abused its discretion in exercising jurisdiction. The appellate decision is reprinted in Appendix A, at pp. 1a-8a.

REASONS FOR GRANTING THE WRIT

I. The Circuit Courts Of Appeal Have Reached Conflicting And Differing Results When Determining Whether A Federal Court May Properly Take Or Refuse To Take Jurisdiction Over A Matter Concerning A Property Interest Where The Controversy Is Concurrently Being Litigated In State Court.

The general and well established rule is that when the situation arises where both a federal and state court have in rem or quasi in rem jurisdiction, the court first assuming jurisdiction over the property may maintain jurisdiction and proceed with the action to the exclusion of

the other court. *See Princess Lida of Thurn and Taxis v. Thompson*, 305 U.S. 456 (1939) and *Penn General Casualty Co. v. Pennsylvania*, 294 U.S. 189 (1935). A question which arises is when is an action considered in rem or quasi in rem for the purposes of invoking the priority principal or the abstention doctrine. It may be argued that an action is in rem, and other courts are precluded from taking jurisdiction, where in a subsequent suit the complaint and the relief demanded requires control of the res, even though in the form of seeking to establish a personal liability. *See, e.g., United States v. Bank of New York & Trust Company*, 296 U.S. 463 (1936).

The question left unresolved by the Circuit Court of Appeals decisions and the Supreme Court decisions cited above is the determination of what constitutes an in rem proceeding, or a proceding sufficiently like an in rem proceeding, to justify the preclusion of subsequent attempts by other forums to exercise jurisdiction over the controversy. For example, in *Smith v. Humble Oil and Refining Co.*, 425 F.2d 1287 (5th Cir. 1970), the Fifth Circuit determined that actions to settle title regarding a specific piece of land were quasi in rem. Therefore, the Fifth Circuit upheld the district court's decision to dismiss a case brought before it on the basis that the parallel state court action between the same parties concerning the same land. The Fifth Circuit upheld the district court's decision that it was without jurisdiction to entertain the subsequent suit.

The Tenth Circuit has also addressed the issue in the context of an "in rem or quasi in rem" proceeding. In *Neagle v. Brooks*, 373 F.2d 40 (10th Cir. 1967), the federal plaintiff had initiated a prior state court action seeking to acquire title to and possession of real estate. The plaintiff lost her case in the lower state court and was in

the process of appealing that decision to the state supreme court when she elected to file a diversity action in the federal district court. When the federal district court refused to grant the defendant's motion to dismiss, the plaintiff elected to pursue her cause in the federal court and abandon her state appeal. The district court determined that the state court decision constituted res judicata and was binding upon it. Therefore, the district court concluded that it was without jurisdiction to hear the second suit.

On appeal, the Tenth Circuit was presented with conflicting theories to the effective date of the final state court order, casting doubt on the ability of the state order to serve as res judicata in the federal court. However, the Tenth Circuit determined that it was not necessary to resolve the dispute as to the effective date of the state court order. The court concluded that at any time

> prior to the final determination by the state court of the appellant's quiet title action, the United States District Court was without concurrent jurisdiction to entertain the second suit involving the same real estate, the res being . . subject to the exclusive jurisdiction and control of the district court. The state court having first acquired jurisdiction of the res, it was required to hear and determine all the controversies relating to it and the property was thereby withdrawn from all other courts. Until the state court's jurisdiction was terminated, the United States District Court was "disabled" from exercising any power or jurisdiction over the same real property.

Id., at 43. Thus, the district court determined that the actions in both the federal and the state court were purely in rem and subject to the rule of *Princess Lida of*

Thurn and Taxis v. Thompson, supra. The Tenth Circuit upheld the district court's conclusion that the actions were in rem, despite the fact that neither court actually took custody of the res.

In *Butler v. Judge of the United States District Court,* 116 F.2d 1013 (9th Cir. 1941), the petitioner sought a writ of mandamus against a judge of the United States District Court for the Northern District of California to compel the judge to proceed with a suit instituted to quiet title. The judge had stayed any proceedings on the action to wait the result of a state action filed by the federal court respondent on the same issues, also seeking a determination as to the underground mining rights in two lots, rights predicated in the contract between the predecessors of the parties in the initial state court action. The Ninth Circuit stated that the general rule in such situations is that where both courts properly have jurisdiction, both actions may proceed. The existence of a parallel state court action should not deprive persons from other states of the protection given to them by the Constitution and the statutes to proceed in federal courts. However, the court went further to state "it has been uniformly held, notwithstanding this consideration, that when the proceedings are in rem or quasi in rem the court first obtaining possession of the res should proceed to final judgment and at the court of concurrent jurisdiction should suspend proceedings and await the conclusion of the case in the court having actual or potential possession of the res." *Id.*, at 1015.

The court determined that an action to quiet title is an action quasi in rem and subject to the above rule. *Id.* It determined that actions to quiet title or actions concerning the use of property, though that property is not taken into the custody of the court, are quasi in rem actions

subject to the rule that the court to first take jurisdiction has exclusive jurisdiction.

The Circuit Court of Appeals decisions indicate that where the court to first take jurisdiction must determine the rights of the parties in real property, though the court does not take custody of the property, the nature of the action is sufficiently like an in rem or quasi in rem action to preclude a subsequent court from acting to determine rights in that same property. In the present case, the state court first took jurisdiction over the property and easement questions, thereby precluding action by any court to subsequently be presented with the same issues. An action to determine easement rights must be subject to this rule for, under West Virginia law, an easement interest is clearly an interest in real property. *See, e.g., Bennett v. Charles Corp.*, 226 S.E.2d 559 (W. Va. 1976) and *Cottrell v. Nurnberger*, 131 W. Va. 291, 47 S.E.2d 454 (1948).

These decisions in the Fifth, Ninth and Tenth Circuits are in conflict with the decision rendered by the Fourth Circuit in the present case.

II. The Issue Presented In The Present Case Was Not Addressed In the Recent Supreme Court Case *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*

In *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 74 L.Ed.2d 765 (1983), the principle issue addressed by the court was the propriety of a district court's decision to stay a federal suit solely on the basis of a parallel state court action which involved the same parties and the same issues. This Court held that a federal district court may decline to exercise jurisdiction over a case properly before it on the basis of a paral-

lel state court action only in exceptional circumstances as required by *Colorado River Conservation District v. United States,* 424 U.S. 800 (1976).

In *Cone Memorial Hospital,* the petitioner hospital had entered into a contract with the respondent contractor for construction of additions to its hospital. The contract contained a dispute resolution procedure which required that disputes be initially submitted to the architect and then if necessary submitted to binding arbitration. A dispute arose during construction with regard to increased overhead and costs allegedly due to the petitioner's delay or inaction. The claims were not resolved pursuant to the contract formula and the petitioner refused to pay them. The petitioner hospital then filed an action in a North Carolina state court against the respondent contractor and the architect seeking a determination that there is no right to arbitration, that it was not liable to the respondent, and that even if it was liable, it would be entitled to indemnity from the architect. The hospital obtained an ex parte injunction from the state court forbidding the contractor and the architect from taking any steps towards arbitration, the stay was dissolved on the respondent's objection. The respondent contractor then filed a diversity action in federal district court seeking an order to compel arbitration under §4 of the United States Arbitration Act. The district court stayed the action pending the resolution of the state suit which involved the identical issue of whether the claims were subject to arbitration. The Fourth Circuit reversed and remanded the case with instructions for the District Court to order arbitration.

This Court upheld the Court of Appeals for the Fourth Circuit relying largely on *Colorado River Water Conservation District v. United States,* 424 U.S. 800 (1976).

Colorado River established that federal courts have an obligation to exercise jurisdiction over cases properly before them unless considerations of state-federal comity or the need to avoid unnecessary constitutional decisions arises or unless the rather exceptional circumstances should exist where for reasons of "wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation" *Colorado River, supra, at* 817 (quoting *McClellan v. Carland,* 217 U.S. 268, 282, (1910)).

Thus, the question before this Court in *Cone Memorial Hospital* was whether a parallel state court action could be considered an "exceptional circumstance" justifying federal court abstention. In *Cone Memorial Hospital* none of the factors present in *Colorado River* which warranted district court abstention were present. "[T]here was no assumption by either court of jurisdiction of *any res or property,* nor is there any contention that the federal forum was any less convenient to the parties than the state forum. The other factors—avoidance of piecemeal litigation and the order in which the concurrent forums obtained jurisdiction—rather than supporting the stay, counsel against it." *Id.,* at 771. (emphasis added) After reviewing all of the above factors, this Court determined that the district court did abuse its discretion in refusing to hear the case that was properly before it since the facts at hand did not satisfy the *Colorado River* exceptional circumstance test. Thus, it appears that *Cone Memorial Hospital* establishes that a district court may not, as a matter of pure discretion, refuse to exercise jurisdiction over a matter properly before it. Rather, the court must weigh the factors set forth in *Colorado River,* and expounded upon in *Cone Memorial Hospital.*

Cone Memorial Hospital does not provide guidance

when the prior state court action involves a property interest. The opinion implies that a suit centered around a specific res may provide a set of circumstances which would meet the exceptional circumstances test of *Colorado River*. However, in view of the differing Circuit Court of Appeals' opinions on what constitutes a matter in rem or quasi in rem for purposes of the application of the priority principal and the exclusive jurisdiction rule, it is uncertain whether a situation like the case at bar is one which would preclude federal court jurisdiction under the *Colorado River* test on the basis that parallel state court action involves the disposition of a property interest. It is Snowshoe's position that cases involving a real property interest, even though the court has not taken custody of a res, require a federal court to stay or abstain where a prior state court action has commenced proceedings on the same issues and between the same parties.

III. Conclusion

Cone Memorial Hospital makes clear that a district court may not, as a matter of pure discretion, refuse to exercise jurisdiction over a case properly before it solely on the basis that there is a pending parallel state court action. Rather the decision mandates the application of the *Colorado River* exceptional circumstances test. However, the decision does not provide guidance in situations where the subject matter of the parallel state court action necessarily involves the disposition of a property interest. The opinions of the Circuit Courts of Appeals are in conflict to the extent that in some circuits a stay or abstention has been upheld only in situations where the state court proceeding was technically in rem. However, in other jurisdictions, Circuit Courts of Appeals have considered a stay or abstention to be a proper exercise of

discretion where a parallel state court action necessarily involves the disposition of a property interest, although the state court may not have custody of or possession of the property in question. The question presented is timely in view of the recent *Cone Memorial Hospital* decision and in view of the increasing case load that federal and state courts face today.

CONCLUSION

For the above stated reasons, petitioner respectfully requests this court to issue a writ of certiorari.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 83-1206

JOHN J. KRUSE AND
LEONARD K. JACKSON,

Appellees,

v.

SNOWSHOE COMPANY,
a West Virginia corporation,

Appellant.

Appeal from the United States District Court for the Southern District of West Virginia, at Charleston. Dennis R. Knapp, Senior District Judge.

Argued: June 8, 1983 Decided: August 10, 1983

Before PHILLIPS and SPROUSE, Circuit Judges, HAYNSWORTH, Senior Circuit Judge.

Deborah A. Sink (P. Michael Pleska, Bowles, McDavid, Graff & Love on brief) for Appellant; James R. Snyder (Thomas E. Potter, Jackson, Kelly, Holt & O'Farrell; John J. Kruse, Leonard K. Jackson on brief) for Appellees.

SPROUSE, Circuit Judge:

This is an appeal from an order of the district court granting John J. Kruse and Leonard K. Jackson's motion for a preliminary injunction against Snowshoe Company. The order prohibited Snowshoe, the operator of a ski resort located in West Virginia, from obstructing a road used by Kruse and Jackson for access to property contiguous to Snowshoe's resort property. Snowshoe contends on appeal that the district court should have abstained because some of the same issues involved in the federal action are being litigated in a parallel West Virginia state-court proceding. We hold that the district court did not abuse its discretion in granting the preliminary injunction, and affirm.

Snowshoe purchased the ski resort property from Mower Lumber Company (Mower) in September, 1973. The deed reserved to Mower and its successors the right to use a road running over and along the boundary of the property, "Black Run Road," for purposes of ingress and egress to adjoining lands then owned by Mower. Contemporaneously with the execution of the deed, Snowshoe and Mower entered into an option agreement granting Snowshoe the right of first refusal to purchase certain lands adjoining its property for a limited period of time.

In 1982, Mower sought to sell a tract of land adjacent to Snowshoe's property, the "Silver Creek Property." When Snowshoe failed to exercise its option to purchase that property, Mower conveyed it to the Trustees for Mace Knob Land Company (the Trustees) on October 22, 1982. The deed included a provision granting to the Trustees an easement to use Black Run Road as a means of ingress and egress to the Silver Creek Property.

In the fall of 1982, Kruse and Jackson expressed an

interest to the Trustees in developing the Silver Creek Property into a ski resort. The Trustees permitted Kruse and Jackson to enter upon the property for the purposes of surveying it and evaluating the feasibility of building the resort. Later in 1982, Kruse and Jackson purchased an option to buy the property. Beginning in early December, 1982, Snowshoe sought to prevent Kruse and Jackson's access to the Silver Creek Property by barricading Black Run Road.[1]

On December 1, 1982, Snowshoe filed an action in the Circuit Court of Pocahontas County, West Virginia, against Mower, the Trustees, Kruse and Jackson. The complaint sought a declaratory judgment concerning the right of first refusal granted to Snowshoe, and concerning the extent of the easement reserved to Mower in the 1973 deed.

Two days after the state action was filed, Jackson and Kruse filed the present action against Snowshoe in the United States District Court for the Southern District of West Virginia, raising common law and contract claims, and asserting violations of state and federal antitrust laws. The federal plaintiffs sought a temporary restraining order and preliminary and permanent injunctive relief requiring Snowshoe to remove all obstructions to plaintiffs' use of Black Run Road, and to desist from preventing the plaintiffs from using that road for access to the Silver Creek Property in the future.

The district court initially issued a temporary restraining order on December 3, 1982, and Snowshoe removed a bulldozer which had blocked the access road. On December 23, 1982, the district court held an evidentiary hear-

[1] Black Run Road apparently is the only means of access to the Silver Creek Property.

ing on Kruse and Jackson's motion for a preliminary injunction, but reserved its ruling based upon an understanding that the *status quo* would be maintained pending the outcome of the state court action. After Snowshoe built a barrier across part of Black Run Road in late February and early March, 1983, the district court issued the preliminary injunction now in issue on appeal.

In the interim, the state trial court issued a partial summary judgment on February 1, 1983, holding that Snowshoe did not have an option to purchase the Silver Creek Property at the time the property was sold to the Trustees. Shortly before oral argument in this appeal, the state trial court also ruled on the issues relating to the use of Black Run Road, holding in favor of Kruse and Jackson.

Snowshoe does not challenge on appeal the propriety of granting the preliminary injunction under the balance-of-hardship test.[2] *See Blackwelder Furniture Co. v. Seilig Manufacturing Co.*, 550 F.2d 189 (4th Cir. 1977). It instead argues that the district court abused its discretion in refusing to abstain from exercising jurisdiction because of the pendency of a parallel state-court action involving some of the same issues which are before the district court.[3]

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[2] The district court found that Kruse and Jackson would be irreparably harmed if they were unable to use Black Run Road during the pendency of the federal litigation because it would delay and possibly terminate their plans to build the ski resort, and that Snowshoe had alleged no legitimate harm. The court then found that injunctive relief was in the public interest in that the plaintiffs' plans involved the expansion of commercial activities in West Virginia, and that grave or serious questions were presented as to the parties' respective rights to use Black Run Road.

[3] Snowshoe also argues in its reply brief that several of the district court's findings of fact in applying the balance-of-hardship test are clearly erroneous, and thus it improperly issued the preliminary injunction. That argument was not raised in Snowshoe's original brief, and thus was not addressed in the appellees' brief. In any event, we disagree with that contention.

The decision of whether to defer proceedings because of parallel state litigation is generally committed to the discretion of the district court.[4] The Supreme Court in *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976), set forth the principles and standards for gauging the propriety of a district court's decision to abstain from exercising its jurisdiction. The Court first summarized the three traditional categories of abstention: (a) " 'cases presenting a federal constitutional issue which might be mooted or presented in a different posture by a state court determination of pertinent state law.' *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185 (1959)"; (b) cases "where there have been presented difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case at bar"; and (c) cases "where, absent bad faith, harassment, or a patently invalid state statute, federal jurisdiction has been invoked for the purpose of restraining state criminal proceedings, state nuisance proceedings antecedent to a criminal prosecution, which are directed at obtaining the closure of places exhibiting obscene films, or the collection of state taxes." *Id.* at 814-16 (citations omitted). The Court concluded that none of those categories applied to the case then before the Court. It nevertheless found that abstention was proper based on "considerations of '[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation.' " *Id.* at 817, quoting *Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.*, 342 U.S. 180, 183 (1952). The Court stated, however, that in view of the "virtually unflagging obligation of the federal courts to exercise the jurisdiction

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[4] *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 51 U.S.L.W. 4156, 4160 (U.S. Feb. 23, 1983); *Will v. Calvert Fire Insurance Co.*, 437 U.S. 655, 663-65 (1978).

given them,"[5] a federal court should abstain for "wise judicial administration" in only "exceptional circumstances."[6] The case before us clearly does not fall under any of the three traditional categories of abstention, and thus Snowshoe must rely on the exceptional-circumstances category applied in *Colorado River*.

The Supreme Court in *Colorado River* declined to precisely define the exceptional-circumstances test, but instead described some of the factors relevant to its application: (a) the assumption by a state court of jurisdiction over property; (b) the inconvenience of the federal forum; (c) the avoidance of piecemeal litigation; and (d) the order in which the concurrent forums obtained jurisdiction. *Id. at* 818-19. The Court, though, recently elaborated on the application of the exceptional-circumstances test in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 51 U.S.L.W. 4156 (U.S. Feb. 23, 1983), stating:

> [T]he decision whether to dismiss a federal action because of parallel state-court litigation does not rest on a mechanical checklist, but on a careful balancing of the important factors as they apply in a given case, with the balance heavily weighted in favor of the exercise of jurisdiction. The weight to be given to any one factor may vary greatly from case to case, depending on the particular setting of the case. *Colorado River* itself illustrates this principle in operation. By far the most important factor in our decision to approve the dismissal there was the "clear federal policy . . . [of] avoidance of piecemeal adjudication of water rights in a river system," *Id.*, at 819, as evinced in the McCarran Amendment. We recognized that the Amend-

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[5] *Colorado River*, 424 U.S. at 817.
[6] *Id.* at 818.

> ment represents Congress's judgment that the field of water rights is one peculiarly appropriate for comprehensive treatment in the forums having the greatest experience and expertise, assisted by state administrative officers acting under the state courts. *Id.*, at 819-820. In addition, we noted that other factors in the case tended to support dismissal -- the absence of any substantial progress in the federal-court litigation; the presence in the suit of extensive rights governed by state law; the geographical inconvenience of the federal forum; and the Government's willingness to litigate similar suits in state court. *Id.*, at 820.

Id. at 4160. The Court in *Cone* noted two additional factors to consider in applying the exceptional-circumstances test: (a) whether the source of law is federal or state, and (b) the adequacy of the state court proceedings to protect the federal plaintiff's rights. *Id.* at 4162-63. The Court further said that the factors are to be applied "in a pragmatic, flexible manner with a view to the realities of the case at hand." *Id.* at 4161.

It is clear in the immediate case that the federal forum is not any less convenient to the parties than the state forum. Likewise, it is doubtful that the state-court litigation involves the type of assumption of jurisdiction over a *res* or property that should have caused the district court to abstain from entertaining an action concerning the right of way. The priority factor, viewed pragmatically, also provides little justification for abstention, While it is true that the state action was filed first, the federal action was filed only two days later, and there has been substantial progress in both actions. *See Cone*, 51 U.S.L.W. at 4161. Moreover, this case involves federal antitrust claims. Thus, not only is the source of law on that portion of the action federal, but the district court

has exclusive jurisdiction over those claims. The Supreme Court in *Cone*, drawing from *Will v. Calvert Fire Insurance Co.*, 437 U.S. 655 (1978), stated that "the presence of federal-law issues must always be a major consideration weighing against surrender," and that such consideration is even more significant when federal jurisdiction is exclusive. *Id.* at 4162. Furthermore, where the district court is presented with a claim over which it has exclusive jurisdiction, a policy opposite to the policy of avoidance of piecemeal litigation is present. *See Cone*, 51 U.S.L.W. at 4162; *Calvert*, 437 U.S. at 673 (Brenan, J., dissenting). In view of these considerations, the district court did not abuse its discretion in refusing to abstain from exercising its jurisdiction in this case.

AFFIRMED

APPENDIX B

IN THE

United States Court of Appeals

FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

JOHN J. KRUSE and LEONARD K. JACKSON,

Plaintiffs,

v. Civil Action No. 82-2591

SNOWSHOE COMPANY, a West Virginia corporation,

Defendant.

PRELIMINARY INJUNCTION

This action came on to be heard on the motion of the plaintiffs, John J. Kruse and Leonard K. Jackson, for a Preliminary Injunction under Rule 65(b) of the Federal Rules of Civil Procedure, pending a resolution of this action on the merits.

The Court having fully considered the evidence and arguments presented by the parties and being of the opinion that plaintiffs' motion is to be granted, it is ORDERED that the defendant, Snowshoe Company, its agents, servants and employees and all persons acting in concert and participation with it be and hereby are restrained and enjoined pending a resolution of this action on the merits from engaging in any course of action which would prevent or cause the plaintiffs to be prevented from entering the "Property" described in the plaintiffs' Amended Complaint by the use of that segment of Black Run Road lying between State Road 9/3, also known as Snowshoe Mountain Road, and said "Property."

It is further ORDERED that the defendant, Snowshoe Company, immediately remove all obstructions from that segment of Black Run Road lying betwen State Road 9/3, also known as Snowshoe Mountain Road and the property described in the plaintiffs' verified Amended Complaint.

This Preliminary Injunction is on condition that, and shall not be effective until, a bond be filed by the plaintiffs herein in the sum of $10,000.00 Dollars, with surety, conditioned for the payment of such costs and damages as may be incurred or suffered by any party found to have wrongfully restrained or enjoined, said bond and surety to be approved by this Court or the Clerk thereof.

Dated: March 4, 1982.

ENTER:

DENNIS R. KNAPP
Judge

A TRUE COPY, Certified this 4th day of March 1983.

RONALD D. LAWSON
Clerk

By .....
Deputy

APPENDIX C

IN THE

United States Court of Appeals

FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

JOHN J. KRUSE and
LEONARD K. JACKSON,

Plaintiffs,

v. CIVIL ACTION NO. 82-2591

SNOWSHOE COMPANY, a West Virginia corporation,
S. FRANKLIN BURFORD and
JOSEPH F. BURFORD,

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW WITH RESPECT TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

1. By a complaint filed on December 3, 1982, and an amended complaint filed on December 14, 1982, in the United States District Court for the Southern District of West Virginia, the plaintiffs sought to enforce certain common law and contract rights as owners of a license and an option with respect to certain real property located in Pocahontas County, West Virginia (hereafter the "property"), and sought a temporary restraining order and preliminary and permanent injunctive relief preventing the defendant, Snowshoe Company, from obstructing or otherwise impeding plaintiffs use of "the Black Run Road" as a means of ingress and egress to the aforesaid real property.

2. On December 3, 1982, pursuant to notice, plaintiffs moved the Court for a temporary restraining order prohibiting the defendant, Snowshoe Company, from engaging in any course of action which would prevent or cause the plaintiffs to be prevented from entering the "property" described in the plaintiffs' complaint and amended complaint by the use of that segment of Black Run Road lying between State Route 9/3, also known as Snowshoe Mountain Road, and said "property" which order was granted.

3. The Court further ordered that the defendant, Snowshoe Company, immediately remove all obstructions from that segment of Black Run Road lying between State Route 9/3, also known as Snowshoe Mountain Road and the property described in the plaintiffs' complaint and amended complaint.

4. Said temporary restraining order expired by its terms on December 13, 1982.

5. By order dated December 10, 1982, the Court, pursuant to Rule 65 of the Federal Rules of Civil Procedure, extended the aforesaid temporary restraining order up to and including December 23, 1982.

6. On December 23, 1982, the Court took evidence with respect to the contentions of the parties regarding their respective rights to use, maintain or obstruct the use of Black Run Road.

7. The Court having been advised, that an action had been commenced by the defendant, Snowshoe Company, in the Circuit Court of Pocahontas County, West Virginia, involving the question of the parties rights with respect to Black Run Road and being advised by the Circuit Court of Pocahontas County that a decision with

respect to that issue would be forthcoming shortly held in abeyance its decision on the plaintiffs' motion for preliminary injunction conditioned upon the agreement of Snowshoe's President and Chief Executive Officer that plaintiffs' access to the "property" by use of Black Run Road would not be impeded.

8. It has since come to the attention of the Court that the defendant, Snowshoe Company, has erected a barrier across a portion of Black Run Road lying between Route 9/3 and the "property" and therefore the plaintiffs' motion for a preliminary injunction must now be decided.

9. That which follows represents the Court's findings of fact and conclusions of law relating to said motion as required by the Federal Rules of Civil Procedure.

FINDINGS OF FACT

10. The plaintiffs are residents of Columbia, South Carolina and citizens of the State of South Carolina and are in the process of planning and constructing a ski resort facility on Snowshoe Mountain, West Virginia.

11. The defendant, Snowshoe Company (hereafter Snowshoe), is a corporation organized and existing under the laws of the State of West Virginia with its principal place of business in Pocahontas County, West Virginia.

12. By deed dated September 6, 1973, of record in the office of the Clerk of the Pocahontas County Commission, the defendant, Snowshoe Company, purchased from The Mower Lumber Company (hereafter Mower), a West Virginia corporation, 6,696 acres, more or less, of real property situate in the Edray and Greenbank Tax Districts of Pocahontas County, West Virginia. In connection therewith, Mower conveyed to Snowshoe certain rights in roads for ingress and egress to said property

with respect to these rights the Deed between Mower and Snowshoe provides in part:

> Mower also hereby grants and conveys unto Snowshoe, its successors and assigns, the non-exclusive right and easement to use, in common with Mower, its successors and assigns, and all other persons having the right to use the same, as a means of ingress and egress to and from said property the following roads:
>
> (a) *The Black Run Road*: Beginning at County Road 1 over 3 (1/3) on Thorny Flats and following Mower's existing road in a northerly direction to the headwaters of Slide Run and Cup Run; thence down Slide Run and continuing on into the drainage of Black Run; thence down Black Run to its mouth; thence across Shavers Fork and continuing on to the intersection of the road from Old Spruce to Spruce.
>
> Mower hereby excepts and reserves for itself, its licensees, invitees, lessees, contractors, grantees, successors and assigns the right to use all or any part of the roads hereinabove described in common with Snowshoe, its successors and assigns and others having the right to use the same, as a means of ingress and egress to and from other and adjoining lands now owned by Mower, regardless whether said roads be located within or without the boundaries of the 6,696 acre tract herein conveyed by Mower to Snowshoe. . . .

The Deed further provides:

> This conveyance is made expressly subject to all rights-of-way and easements, recorded or unrecorded, heretofore granted to others by Mower or its predecessors in title, and to all easements

and rights-of-way, public or private, which are visible upon the ground.

13. In connection with the aforesaid Deed, Mower and Snowshoe entered into a Right-of-Way and Road Maintenance Agreement dated September 6, 1973. Said Agreement granted Snowshoe the right to use certain roads for ingress and egress and with respect to the Black Run Road provides as follows:

> Snowshoe shall henceforth have control of the Black Run Road, subject only to the right of use by Mower, its officers, agents, employees, invitees, licensees, successors and assigns and other persons having the right to use the same.

14. By deed dated October 22, 1982 and of record in the office of the Clerk of the Pocahontas County Commission, Mower conveyed to John F. Brown, Jr., John E. Busch and Stephen G. Jory, Trustees (hereafter the Trustees), a tract of land situate in Pocahontas County, West Virginia, containing 2,646.7 acres, more or less (hereafter the Property), and located contiguous to the property purchased from Mower by Snowshoe and described in paragraph 12 above and separated by the Black Run Road. With respect to the right to use Black Run Road, the Deed from Mower to the Trustees provides that:

> Mower also hereby grants and conveys unto Grantees, their successors and assigns, the non-exclusive right and easement to use, as a means of ingress and egress to said 2,646.70 acres of land herein conveyed in common with Mower, its successors and assigns and all other persons having right to use the same the following:
>
> a. The Black Run Road extending from County Road 1 over 3 (1/3) on Thorny Flats to its

intersection with the road from Old Spruce to Spruce; and

b. The road from Old Spruce to the boundary of the Western Maryland property at Spruce.

This conveyance is made subject to all rights and easements in said roads heretofore conveyed by Mower to Snowshoe Company by said deed dated September 6, 1983.

15. In October 1982, the plaintiffs became aware of the Property and its potential as the site for the development of a major ski resort and entered into negotiations with the Trustees who at that time had certain contractual rights to purchase the Property from the Mower Lumber Company. Plaintiffs and Trustees reached agreement providing for certain option rights in the plaintiffs to purchase all or certain portions of the Property and to enter upon the same by use of the Black Run Road for the purposes of evaluating the same to determine its feasibility for such a development. Pursuant to such agreement, the plaintiffs entered upon the Property by use of the Black Run Road and caused their surveyors, engineers and other agents and employees, to make studies, surveys, evaluations and laid out certain ski slopes, building sites and proposed roads and other facilities at a substantial cost to plaintiffs. Based upon these studies, surveys and evaluations, plaintiffs intend to construct a ski resort on the Property and have financially committed themselves for further surveying and enginering services.

16. The plaintiffs were also granted a license to enter upon the Property for the purposes of finishing their evaluation by use of the Black Run Road, all pursuant to a License Agreement granted by the Trustees dated November 29, 1982. Pursuant to this License Agreement,

plaintiffs desire to continue to enter upon the Property to conclude studies and site preparation, begin construction and to proceed with efforts to market condominium units during the winter season of 1983.

17. Plaintiffs' ability to construct the proposed ski resort is dependent upon their ability to pre-sell condominium units to be located on the Property.

18. The only means of ingress to and egress from the Property by way of public road is State Route 9/3, also known as the Snowshoe Mountain Road. which is connected to the Property only by an unpaved section of Black Run Road approximately 50 feet in length.

19. Defendant Snowshoe has erected a barrier across all or part of Black Run Road.

20. The plaintiffs will be irreparably harmed if they are not permitted the use of the portion of Black Run Road in issue in this proceeding during the pendency of this litigation for the reason that they will be unable to (i) complete the site preparation plans; (ii) engage in the pre-sales activities necessary for opening the ski resort in December of 1983 as planned; and (iii) commence construction.

21. The defendant has neither alleged nor demonstrated that its use of this portion Black Run Road has been in any way impeded by the use made by the plaintiffs to date or that the proposed use by the plaintiff during the pendency of this litigation will in any way impede defendant's use of Black Run Road.

22. The only harm alleged by the defendant which would result from granting the injunctive relief sought by the plaintiffs would be its inability to obstruct or deny the plaintiffs the use of Black Run Road so as to restrain

or hinder the plaintiffs in their efforts to compete with Snowshoe.

CONCLUSIONS OF LAW

23. In evaluating a motion for preliminary injunction, it is the Court's duty to consider the interplay of the following factors: the likelihood of irreparable harm to the plaintiff if injunctive relief is not granted; the likelihood of harm to the defendant if the injunction is granted; plaintiffs likelihood of success on the merits; and the public interest. *Maryland Undercoating Co., Inc. v. Payne*, 603 F.2d 477 (1979); *Blackwelder Furniture Co. v. Seilig Manufacturing Co.*, 550 F.2d 189 (4th Cir., 1977). If in balancing the likelihood of irreparable harm to the plaintiff without an injunction against the likelihood of harm to the defendant with an injunction a decided imbalance of hardship appears in plaintiffs' favor, it is enough that grave or serious questions are presented; plaintiff need not show a likelihood of success on the merits. *Maryland Undercoating Co., Inc. v. Payne, supra.*

24. In regard to the interpretation of the agreements at issue between the parties, the Court has been advised that the Circuit Court of Pocahontas County, in denying in part and granting in part a motion of the defendants for summary judgment has reached certain conclusions of law which this Court is in agreement with. These conclusions are: (a) the right of Mower Lumber Company to use Black Run Road reserved in the September 6, 1973 Deed set forth above is unrestricted as to manner or frequency; (b) any and all rights possessed by Mower with respect to the use of the portion of Black Run Road in issue in this proceeding have vested in the "Trustees" and the plaintiffs; (c) Mower, its successors and assigns, have and will always have the right to make a reasonable

use of Black Run Road; (d) the Right-of-Way and Road Maintenance Agreement dated September 6, 1973, granting the defendant, Snowshoe, control of Black Run Road subject to Mower's right of use is not clear and unambiguous on its face and a genuine issue of material fact is raised as to the extent of this right of the plaintiffs to use the road as an access to a major ski resort.

25. The Court therefore concludes that the balance of hardship tests set forth above is decidedly in favor of the plaintiffs in that the hardship to plaintiffs without an injunction is substantial in that denying plaintiffs use of Black Run Road could delay or possibly terminate plaintiffs plans to build a ski resort; the defendant has alleged no impediment to its use of Black Run Road as a result of the plaintiffs planned useage during the pendency of this litigation; and the only alleged harm to defendant from the granting of an injunction is its inability to restrain plaintiffs from competing with it by controlling and obstructing plaintiffs use of Black Run Road.

26. As to this alleged hardship, the Court finds that it is not only speculative but is not cognizable inasmuch as defendants ability to use and control the means of passage to restrain competition is not a justifiable reason for denying injunctive relief.

27. Insofar as the public interest is involved in this case, that interest lies with the plaintiffs in that the plaintiffs plans involve the expansion of commercial activities in the State of West Virginia.

28. Based upon the foregoing, it is the Court's conclusion that the plaintiffs have demonstrated that, at the very least, grave or serious questions are presented as to the respective parties rights to use and control Black Run Road and that the plaintiffs showing on the merits

of the case are sufficient when considered in connection with the balance of harm test and the interest of the public to warrant the granting of a preliminary injunction.

Dated: March 7, 1983.

ENTER:

DENNIS R. KNAPP
Judge

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